

NOT FOR PUBLICATION – NOT PRECEDENTIAL

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CRIM. NO. 2004-0172
ISAIAH FAWKES,)	
)	
Defendant.)	
_____)	

ORDER

THIS MATTER came before the Court on Defendant’s Motion for Sanctions and Motion Requesting Ruling. A hearing was held on such motions on May 27, 2005. The remaining issue is whether the disclosure the Government has provided pursuant to 16(a)(1)(G) of the Federal Rules of Criminal Procedure, and in response to this Court’s Order of February 22, 2005, is sufficient.

Pursuant to Rule 16(a)(1)(G), at the defendant’s request, the government must give the defendant a written summary of any testimony that the government intends to use under Rule 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. The summary “must describe the witness’s opinion, the bases and reasons for those opinions, and the witness’s qualifications.” Fed. R. Crim. P. 16(a)(1)(G).

The Advisory Notes to the 1993 Amendment explain that Rule 16(a)(1)(G) and the rule requiring the defendant to provide reciprocal discovery were “intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert’s testimony through focused

cross-examination.” The Advisory Notes envision the summary as comprehensive, indicating that it “should cover not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rules of Evidence 703, including opinions of other experts.”

The Court has reviewed the Government’s disclosure and finds that it does not meet the requirements of Rule 16(a)(1)(G) in that, although it describes the witness’s opinion, it does not provide an adequate basis or reasons for such opinion, falling short of the demands of the rule, as clarified in the Advisory Notes. The expert disclosures do not provide Defendant Fawkes with a fair opportunity to test the merit of the expert’s testimony through focused cross-examination.

Although the Court, at first ordered exclusion of the Government’s expert, it has reconsidered since “[e]xclusion is an appropriate remedy for a discovery rule violation only where ‘the omission was willful and motivated by a desire to obtain a tactical advantage.’” United States v. Finley, 301 F.3d 1000, 1018 (9th Cir. 2002) (quoting Taylor v. Illinois, 484 U.S. 400, 415 (1988)). Because the Government was diligent in that it did produce what it may have considered to be an adequate disclosure in response to the Court’s Order of February 22, 2005, the Court will not employ such a harsh sanction.

Challenged expert testimony is only admissible under Rule 702 “if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods, reliably to the facts of this case.” Thus, upon an opponent’s objection, the party proffering the expert must demonstrate that these three criteria are met.

While Rule 16 and Rule 702 “are two independent requirements,” United States v. Rich,

326 F. Supp.2d 670, 676 (E.D. Pa. 2004), a defendant cannot make a meaningful objection and knowledgeably cross-examine a Government expert at trial if the Government does not disclose the manner in which its expert will establish admissibility in advance of trial. If such disclosure only occurs during trial, the Court, at the defendant's request, would inevitably have to continue the trial to allow the defense an opportunity to consult with its own expert with regard to the reliability of the principles and methods employed by the Government's expert. A continuation in the midst of a trial, after a jury is empaneled, is problematic in that the jurors may not have a vivid memory of the evidence presented prior to the continuance when the trial resumes, the jurors may seek to be excused, and the Court would have to adjust the scheduling of other matters to allow for the continuance.

Thus, even when an expert disclosure is sufficient to satisfy the requirements of Rule 16, upon motion, the Court could require that the expert report also comport with Rule 702 to avoid having to continue the trial midstream. Therefore, it is hereby

ORDERED that in the interests of practical trial management, this matter is

CONTINUED until the earliest available trial date;

that the Motion for Sanctions is **DENIED**;

that the Motion Requesting Ruling is **GRANTED**;

that the Government's disclosure pursuant to Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure is **INSUFFICIENT**;

that the Government has ten days from the date of this Order to **SUPPLEMENT**;

that the parties have until ten days thereafter to file any further pre-trial motions; and

that the time from the date of the hearing on this matter until the new trial date is

excluded from the speedy trial calculus because, for the foregoing reasons, the ends of justice served by this continuance outweigh the best interest of the public and the defendant in a speedy trial.

ENTER:

DATED: May 31, 2005

_____/s/_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:

Wilfredo F. Morales
Clerk of Court

by: _____
Deputy Clerk

cc: The Honorable George W. Cannon, Jr., U.S. Magistrate Judge
Jerry Massie, Esq.
Jomo Meade, Esq.